IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 215 of 1991

For Approval and Signature:

Hon'ble MR.JUSTICE J.N.BHATT and
MR.JUSTICE A.K.TRIVEDI

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

PUNABHAI JITABHAI BARIA

Versus

STATE OF GUJARAT

Appearance:

MR PJ YAGNIK for Petitioner

MR K.P.RAWAL, ADDL.PUBLIC PROSECUTOR for Respondent No. 1

CORAM : MR.JUSTICE J.N.BHATT and
MR.JUSTICE A.K.TRIVEDI

Date of decision: 15/06/98

ORAL JUDGEMENT per Bhatt,J.

The appellant has questioned the legality and validity of the order dated 7.3.1991 passed by the learned Additional Sessions Judge, Panchmahals at Godhra , whereby the appellant-original accused No.1- one of the three

accused- came to be convicted for life imprisonment for the offence punishable under Section 302 of the Indian Penal Code, in sessions case No, 117 of 1990 ,by filing this appeal through jail ,inter alia contending that he was innocent and not guilty for the alleged offence.

The appellant is also provided legal aid as desired upon receipt of memo of appeal through jail. However, unfortunately, the learned advocate who was assigned the work of defending the appellant under the legal aid scheme has not been able to convince us. We have extensively heard the learned Additional Public Prosecutor appearing for the respondent-State and we have also carefully and dispassionately examined the original record,proceedings and evidence relied upon by the prosecution.

A short resume of the prosecution case leading to rise of this appeal may be shortly narrated at the outset. The appellant and his two sons came to be charged under secftions 302 and 201 ,IPC by the trial court in sessions case No.117 of 1990. The appellant was accused No.1 and his two sons were accused Nos.2 and 3 viz. Navalsinh Punabhai and Kantilal Punabhai respectively before the trial court. The substratum of the charge was that the appellant had committed murder on 20.5.1990 at midnight in village Sajora in Devgadh taluka of Panchmahals district , his son Balvant by assaulting with the help of axe on the right side of the neck and it was done with intention to murder and thereby committed an offence under Section 302 of the IPC. The appellant was also charged for having committed an offence punishable under Section 201 of the IPC, in that, it was alleged that with intention to dispose of the material evidence of murder of his son, the dead body was thrown in the well of Balvant Shana and a false complaint was filed by the appellant against Teta Sona with the help of his two sons. Accused Nos.2 and 3 were also charged for having committed offences punishable under Sections 302 and 201 read with section 114 of the IPC.

The accused persons pleaded not guilty and claimed to be tried . The prosecution placed reliance on oral evidence of the following witnesses:

1.Dr Chandrahas, Ex.14
2.Balwantbhai Ratnabhai,ex. 16
3.Mohansingh Abhesinh,ex. 17
4.Bhikhabhai Valabhai,ex.18
5.Investigating office A.R.Parmar,ex. 20, and
6.J.A.Upadhyaya,ex. 22

The prosecution also placed reliance on the documentary evidence to which reference may be made at appropriate stage.

The trial court, upon appreciation of the evidence and consideration of the facts and circumstances ,found the appellant guilty for the offence punishable under Sections 302 and 201 of the IPC and acquitted accused Nos.2 and 3 giving them benefit of doubt. The appellant,therefore, came be sentenced to imprisonment for life and fine of Rs. 1000/- and in default, to undergo R.I. for three months.for the offence under Section 302 of the IPC. No separate sentence came to be recorded against the appellant under section 201 of IPC/

After having considered the facts and circumstances and the evidence on record and submissions of the learned Additional Public Prosecutor, we are of the opinion that the impugned order of the learned trial Judge is not supportable .The impugned order came to be recorded only upon circumstantial evidence.We need not divulge on the celebrated established principle of appreciation of circumstantial evidence. In order to succeed, the prosecution is obliged to establish the complicity of the accused by leading clear, convincing and reliable evidence in case of circumstantial evidence and the whole chain must be so complete that there should not be any hypothesis for the innocence of the accused.In our opinion, this principle has not been properly appreciated and applied to the facts of the present case by trial court which has culminated into passing of the impugned order of conviction and sentence against the appellant.

It is an admitted fact that there is no direct evidence incriminating against the appellant. The learned Additional Public Prosecutor has placed reliance on the discovery of fact resulting into recovery of muddamal blade and handle of the axe used in the commission of offence in question. Panchnama of recovery is produced at ex. 19 which came to be proved in the evidence of panch witness Bhikhabhai Valabhai,ex. 18. However, the oral evidence consisting of medical officer, owner of the well from where the dead body was found and the Sarpanch of the village and also evidence of the investigating officers examined at exs. 14,16,17,20 and 22 respectively do not as such admittedly constitute any incriminating evidence against the appellant. The only information on which reliance is placed is the recovery of the blade portion and handle portion of the axe allegedly used in the commission of crime , placing

reliance on the provisions of Section 27 of the Indian Evidence Act which prescribes how much information received from the accused may be proved.

Section 27 of the Evidence Act can be successfully employed into service by the prosecution provided the conditions contained in section 27 are established. So, the provisions of section 27 are provided by way of exceptions to sections 25 and 26 of the Act to prove the complicity of the accused. Therefore, it is obligatory upon the prosecution to show that the material conditions contained therein are successfully satisfied. Section 27 ,therefore, provides that no confession made by any person while he is in custody of a police officerwill be admissible unless it is made by a statement discovering a fact leading to recovery of muddamal article.In order that section 27 may apply, it is obligatory for the prosecution to successfully establish that the information given by the accused or a statement made by him led to discovery of some fact.In short, the material condition must be first successfully shown so as to use provisions of section 27 which are in nature of exceptions to provisions of sections 25 and 26 of the Evidence Act.After fulfulment and establishment of the conditions, discovery of fact by recovery of muddamal incriminating the accused can be used to show culpability of the accused under Section 27. Nonetheless, it would be the evidence in the nature of corroboration. So, discovery or recovery of weapon as contemplated under section 27 is corroborative piece of evidence.

It appears from the record , upon examination of the evidence,that all material ingredients and conditions of section 27 are not established beyond doubt,successfully. For applicability of provisions of section 27, main two conditions which are pre-requisite must be shown viz, (i) the information must be such as to lead to recovery of the fact and (ii) information must relate distinctly to the fact or information. If the material conditions are established, recovery of weapon at the instance of the accused, which is seized by the police after following the requisite procedure , can be corroborative piece of evidence against the accused. Since we are not fully satisfied with the material conditions of section 27 established successfully by the prosecution to use confession or information or incriminating recovery under section 27 , memo of panchnama provided in the evidence of panch witness Bhikhabhai,ex. 18 is of no avail to the prosecution.

Be that as it may, even if we were to hold that

conditions pre-requisite to attract provisions of Section 27 are established by the prosecution successfully, then in that case, it would be corroborative piece of evidence. Therefore, panchnama produced at ex. 19 and proved in the evidence of panch witness Bhikhabhai ex.18 can be incriminating evidence which is in the nature of corroboration to the substantive piece of evidence,if any. There is no substantive evidence. Therefore, mere proving panchnama or discovery of fact under section 27 cannot be used in the facts and circumstances of the present case to pass conviction order under section 302 and also under section 201, against the appellant. The proposition of law on which we place reliance is extensively expounded and very well examined by a catena of judicial pronouncements. In Babboo vs. State of M.P.,AIR 1979, S.C.1042, the Honourable Apex court laid down the said proposition of law. It is held that recovery of muddamal article is corroborative piece of evidence and if there is no substantive evidence worth the name, such recovery of article would hardly advance the case of prosecution against the accused.

Therefore, reliance on recovery of human blood stained blade ,upon information of the accused from his house by seizure memo ex.19 which came to be proved in the evidence of panch witness Bhikhabhai ex. 18,in the facts and circumstances of the case,cannot be used to base conviction to sustain the impugned order of learned Additional Sessions Judge. No doubt, even inadmissible part and portion of memo and evidence of panch witness has not been deleted or has wrongly been recorded , need not be gone into at this stage for the simple reason that recovery panchnama ex.19 even assuming that conditions or pre-requisites of section 27 are established successfully, then also, is only corroborative piece of evidence in the facts and circumstances of the case and in the absence of any substantive evidence, no conviction order can be founded upon mere recovery of blood stained blade at the instance of the accused from his house. This aspect has not been properly appreciated by the learned trial Judge. It is an admitted fact that the entire order is merely founded upon ex. 19 recovery panchnama which is not sufficient to establish the complicity of the appellant under Sections 302 and 201 of the IPC beyond reasonable doubt. We are, therefore,left with no alternative but to quash and set aside the impugned judgment and order.

In the facts and circumnstances narrated hereinabove and the proposition of law discussed earlier, the appeal is allowed. The impugned order of conviction and sentence

is quashed and set aside. The appellant-accused is acquitted of the said charges levelled against him.He shall be released forthwith if not required in any other trial, case or inquiry.
